INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Discussion	6
Conclusion	13

CITATIONS

CASES:

American Trucking Ass'ns v. *United States*, 344 U.S. 298 .. 8
American Guaranty Corp. v. *Burton*, 380 F.2d 789 12
Blackmar v. *Guerre*, 342 U.S. 512 .....10, 11
Carlson v. *Landon*, 342 U.S. 524 8
Ceballos v. *Shaughnessy*, 352 U.S. 599 10
Chournos v. *United States*, 355 F.2d 918 11
Doyle v. *Fleming*, 219 F. Supp. 277 .....10, 13
Dugan v. *Rank*, 372 U.S. 609 .....11, 12
Hawaii v. *Gordon*, 373 U.S. 57 .....11, 12
Land v. *Dollar*, 330 U.S. 731 12
Larson v. *Domestic & Foreign Corp.*, 337 U.S. 682 11
Malone v. *Bowdoin*, 369 U.S. 643 11
Mine Safety Co. v. *Forrestal*, 326 U.S. 371 .....11, 12
Shaughnessy v. *Pedreiro*, 349 U.S. 48 10
United States v. *Remund*, 330 U.S. 539 11
Wells v. *United States*, 214 F.2d 380, certiorari denied, 348 U.S. 855 13
Williams v. *Fanning*, 332 U.S. 490 10

STATUTES:

Act of July 9, 1937, Ch. 470, Sec. 3, 50 Stat. 487 7
Canal Zone Code, Title 2, 76A Stat. 6 *et seq:*
2 C.Z. Code 31 11
2 C.Z. Code 65(a)(2), (3) 11
2 C.Z. Code (1934 ed.) 81(c) 7

Page

2 C.Z. Code 142 11
2 C.Z. Code 142(a) 3
2 C.Z. Code 142(b) 2, 3, 6, 9
2 C.Z. Code 146 ..... 3, 4, 5, 6, 8
2 C.Z. Code 155 ..... 4, 6, 9
Independent Offices Appropriations Act of 1949, Section 207, 62 Stat. 194, now codified as 5 U.S.C. 5941 8
Overseas Differentials and Allowances Act, 74 Stat. 792, as amended, 5 U.S.C. 5921 *et seq.* 8, 9
Panama Canal Act of 1912, 37 Stat. 560 7
28 U.S.C. 451 13
28 U.S.C. 1346(a)(2) 13
28 U.S.C. 1391(e) 10

REGULATIONS:

Department of State Standardized Regulations (Government Civilians Abroad), Sections 031.12, 031.13, 031.2, and 031.3 10
5 C.F.R. (1964 Rev.) 591.303(c)(1) 10
35 C.F.R. (1967 Rev.) 253.135 ..... 5, 9

MISCELLANEOUS:

48 Cong. Rec. 6768 7
30 Dec. Comp. Gen. 337 10
Exec. Ord. No. 11171, 29 Fed. Reg. 11897 11
H. Rep. No. 1869, 85th Cong., 2d Sess. 7

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 732

PAUL BRAMLETT, ET AL., PETITIONERS

v.

BRIGADIER GENERAL WALTER P. LEBER, GOVERNOR OF THE CANAL ZONE AND PRESIDENT OF THE PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, *sub nom. Leber* v. *Canal Zone Central Labor Union, et al.* (Pet. App. 14a), is not yet reported. The opinion of the United States District Court for the District of the Canal

Zone (Pet. App. 32a) is reported, *sub nom. Canal Zone Central Labor Union, etc.* v. *Fleming,* at 246 F. Supp. 998.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1967 (Pet. App. 31a). The petition for a writ of certiorari was filed on October 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under a statute which provides that, in addition to their basic compensation, American-citizen government employees in the Canal Zone shall be paid, in "such amounts as the head of the department concerned determines to be payable," an "overseas (tropical) differential not in excess of" 25 percent of their basic compensation and special tax allowance, the amount of the "tropical differential" payable may be fixed at less than the 25 percent figure.

2. Whether, by virtue of Section 142(b) of Title 2 of the Canal Zone Code, dependents of persons living in the Canal Zone were properly excluded from receiving the tropical differential in addition to their regular salaries.

3. Whether the Secretary of the Army, the official charged with responsibility for regulating the conditions of payment of the tropical differential, was a necessary party to this action.

STATUTES INVOLVED

Title 2 of the Canal Zone Code, 76A Stat. 6 *et seq.*, provides in pertinent part:

SECTION 142. *General rules governing wage and employment practices*

(a) The head of each department shall conduct the wage and employment practices in the Canal Zone of his department in accordance with the:

(1) principles established in item 1 of the Memorandum of Understandings set forth in section 1(b) of Public Law 85-550 (July 25, 1958, 72 Stat. 405);

(2) provisions of this subchapter;

(3) regulations promulgated by, or under the authority of, the President of the United States in accordance with this subchapter; and

(4) provisions of applicable law.

(b) To the extent he deems appropriate, the President may:

(1) exclude any employee of position from this subchapter or from any provision of this subchapter; * * *

* * * * *

SECTION 146. *Additional allowance and differential*

In addition to established basic compensation, there shall be paid to each employee who is a citizen of the United States such amounts as the head of the department concerned determines to be payable, as follows:

(1) an allowance for taxes which operate to reduce his disposable income in comparison

with the disposable incomes of those employees who are not citizens of the United States; and

(2) an overseas (tropical) differential not in excess of an amount equal to 25 per cent of the aggregate amount of the rate of basic compensation so established and the amount of the allowance provided in accordance with paragraph (1) of this section.

SECTION 155. *Administration by President; regulations; delegation of authority*

(a) The President shall coordinate the policies and activities of the respective departments under this subchapter, and may promulgate regulations necessary and appropriate to carry out the provisions and accomplish the purposes of this subchapter.

(b) The President may delegate any authority vested in him by this subchapter, and may provide for the redelegation of any such authority.

STATEMENT

Petitioners, five individuals employed in the Panama Canal Zone by the Canal Zone Government or the government-owned Panama Canal Company, sued for a judgment declaring invalid, and an injunction against enforcing, certain regulations of the Secretary of the Army dealing with payment of the so-called "tropical differential."[1] That differential is an allowance payable under 2 C.Z. Code 146 to American citizens employed in the Canal Zone over and above

[1] The Canal Zone Code vests the President with authority over wage practices in the Canal Zone and authorizes him to delegate that authority. 2 C. Z. Code 155. As the court of appeals noted, that authority was duly delegated to the Secretary of the Army (see Pet. App. 16a).

the regular compensation provided for their government jobs. In substance, the challenged regulations reduced the amount of that extra allowance from 25 percent to 15 percent of their basic compensation and precluded payment of any differential to dependents of persons living in Panama and the Canal Zone.[2] Although petitioners named the Secretary of the Army as well as respondent as a party defendant in the suit, the Secretary was not served and did not appear in the action.

The District Court for the District of the Canal Zone concluded that "the only reasonable interpretation that can be put upon Section 146 * * * is that it is mandatory and that the differential shall be 25 percent but 'not in excess' of that sum * * *" (Pet. App. 37a), and, moreover, must be paid to all employees without exception. On this basis it granted the declaratory and injunctive relief sought by petitioners (Pet. App. 54a-57a), but stayed the effect of its decision pending final disposition of an appeal (Pet. App. 58a-59a).

The court of appeals reversed, holding unanimously that "the plain language" (Pet. App. 24a) of 2 C.Z. Code 146 and its statutory predecessors established that Congress intended to make the payment of the "tropi-

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[2] The pertinent regulations challenged in the instant action (Pet. App. 10a) now appear at 35 C.F.R. (1967 Rev.) 253.135. By virtue of a savings clause, persons in government employment in the Canal Zone when the regulations became effective continue to receive the dollar amount of any differential they were receiving at that time. However, they will receive no increase in that differential until, by virtue of promotions or pay raises, the amount of differential payments they receive falls below 15 percent of their basic compensation. As to dependents, however, the right to continue receiving any tropical differential expired two years after the Secretary's regulations became effective in 1964. See 35 C.F.R. (1967 Rev.) 235.135(b) and (c).

cal differential" a discretionary matter, and that other sections of the Canal Zone Code (2 C.Z. Code 142(b) and 155) authorized the President or his delegate to exclude any class of employees from receipt of that differential (Pet. App. 26a-27a).

By a divided vote, the Fifth Circuit also held that this suit could not be maintained because the Secretary of the Army, to whom the President has delegated authority to regulate differential allowances in the Canal Zone and whose regulations were being challenged by petitioners, was an indispensable party who had not been joined in the action (Pet. App. 19a-20a, 30a). Additionally, insofar as relief was sought against respondent as Governor of the Canal Zone, the court held that the suit was an unconsented action against the United States (Pet. App. 21a-22a).

DISCUSSION

The decision of the court of appeals is plainly correct on the merits and there is no conflict with decisions of other circuits or of this Court. Further review in this Court is therefore not warranted.

1. Simply stated, petitioners contend that Congress vested American citizens employed in the Canal Zone with a permanent right to receive salaries 25 percent higher than those paid government employees in the United States for similar work. As the carefully reasoned opinion of the court below makes clear, however, neither the language of the governing statute nor its legislative history supports that contention. Section 146 of Title 2 of the Canal Zone Code, upon which petitioners' rely, is not cast in mandatory terms. Rather, it provides only that "such amounts as the

head of the department concerned determines to be payable" shall be paid as "an overseas (tropical) differential" limited to a figure "not in excess of an amount equal to 25 per cent" of an employee's basic compensation. And, as the court of appeals' opinion also notes (Pet. App. 25a), the House committee which drafted Section 146 referred to the tropical differential authorized thereunder in discretionary terms as an allowance which "may be paid." H. Rep. No. 1869, 85th Cong., 2d Sess., p. 17 (1958). As the opinion below explains (Pet. App. 22a-25a), the language of Section 146 governing differential payments originated in an amendment from the floor of the House to the proposed Panama Canal Act of 1912 (37 Stat. 560) designed to place a ceiling on the payment of extra wages to government employees in the Panama Canal Zone.[3] Subsequent legislation pertaining to salary differentials payable in the Canal Zone retained the limiting language of the original enactment.[4] There is no evidence—and petitioners cite none—that Con-

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[3] See the remarks of Congressman Adamson at 48 Cong. Rec. 6768 (quoted in the Fifth Circuit's opinion, at Pet. App. 25a), explaining his amendment to the provisions of that 1912 legislation which then governed salary practices in the Canal Zone. His amendment, which was adopted (37 Stat. 561), provided that "salaries or compensation fixed hereunder by the President *shall in no instance exceed by more than twenty-five per centum* the salary or compensation paid for the same or similar services to persons employed by the Government in the continental United States" (emphasis supplied).

[4] See, e.g., 2 C.Z. Code (1934 ed.) 81(c); Act of July 9, 1937, Ch. 470, Sec. 3, 50 Stat. 487. Contrary to petitioners' contention (Pet. 15), the fact that the authority to set the tropical differential at a rate lower than the authorized maximum was not acted upon for a period of years hardly did away with that discretionary authority or converted the established ceiling into a fixed, mandatory figure.

gress ever expressed any intent to convert the 25 percent ceiling it placed on salary differentials payable in the Canal Zone into a permanent allowance to government employees fixed at that figure. Given the additional factor that parallel legislation providing hardship differentials for government employees at other posts around the world uniformly makes the appropriate level of differential discretionary with the President or his delegate,[5] the court of appeals did not err in refusing to read into 2 C.Z. Code 146 a congressional intent to establish a fixed differential for Canal Zone employees alone.[6] Had that been what Congress intended to do, it surely could have, and presumably would have, chosen more apt language.

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[5] See, *e.g.*, the Overseas Differentials and Allowances Act, 74 Stat. 792, as amended, 5 U.S.C. 5921, 5922 and 5925, and Section 207 of the Independent Offices Appropriations Act of 1949, 62 Stat. 194, now codified at 5 U.S.C. 5941, which authorize paying hardship differentials to government employees stationed in foreign areas or on American territory outside the continental United States in discretionary amounts which "may not exceed 25 percent of the rate of basic pay."

[6] There is no substance to the contention (Pet. 16) that it would be an unconstitutional delegation of legislative power to read 2 C.Z. Code 146 as giving the Secretary discretion to fix the level of the tropical differential because of that provision's "fail[ure] to prescribe [specific] standards" for the Secretary's guidance. The statute narrowly limits the range of that discretion to a sum not exceeding 25 percent of an employee's basic compensation. As the court of appeals noted (Pet. App. 29a), the allowance is fully understood to be used as a recruitment incentive. This Court has upheld, as not violative of the doctrine of delegated powers, congressional delegations of broader authority accompanied by a less strictly defined purpose. See, *e.g.*, *American Trucking Ass'ns* v. *United States*, 344 U.S. 298, 312; *Carlson* v. *Landon*, 342 U.S. 524, 542-544.

2. Neither is there merit to petitioners' contention that the Secretary exceeded his authority in precluding dependents of persons employed in Panama or in the Canal Zone from receiving the tropical differential. The Code expressly authorizes the President or his delegate "to the extent he deems appropriate" to "exclude any employee or position from this subchapter [governing, *inter alia,* payment of differentials] or any provision of this subchapter" (2 C.Z. Code 142(b) and 155). The Secretary's regulations have an entirely rational foundation which does not contravene the nondiscrimination policies of the government. Differential allowances are paid as "a recruitment and retention incentive" to induce American citizens to serve the government at hardship posts abroad (see, *e.g.,* 5 U.S.C. 5925). No incentives of this nature are necessary for persons already residing outside the United States for personal reasons other than their government employment. Dependent children and married women are normally abroad to be with their families; they suffer no additional hardship merely by taking government jobs for which they are fully compensated. Of course where circumstances negate that usual presumption, *e.g.,* where the wife is the principal family breadwinner or is separated from her husband, then the regulations provide for her to receive the tropical differential (35 C.F.R. (1967 Rev.) 253.135(b)(1)). Indeed, in addition to being wholly rational, the regulations in question do no more than extend to federal employees in the Canal Zone longstanding governmental policies governing eligibility for hardship allowances applied to all other govern-

ment employees stationed outside the continental United States.[7]

3. While, if the Court agrees with the foregoing analysis it need not reach the question, we think the court of appeals was equally correct in holding that this suit could not be maintained because the Secretary of the Army was an indispensable party not joined in the action.[8] Practical considerations determine when a party is indispensable. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 54. The test is whether the decree sought would "effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Williams* v. *Fanning*, 332 U.S. 490, 494. In the instant case, effective relief would require that the Secretary take action by directly exercising the power lodged in him by the President. Therefore, the case comes within the express language of *Williams* v. *Fanning*, to the effect that "the superior officer is an indispensable party if the decree granting the relief sought would require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" (332 U.S. at 493). Accord, *Ceballos* v. *Shaughnessy*, 352 U.S. 599; *Blackmar* v. *Guerre*, 342 U.S. 512.

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[7] See 5 C.F.R. (1964 Rev.) 591.303(c)(1) (Civil Service Commission Regulations governing allowances payable on American territory outside the continental United States); Department of State Standardized Regulations (Government Civilians Abroad) §§ 031.12, 031.13, 031.2 and 031.3 (governing foreign area employment); and 30 Dec. Comp. Gen. 337.

[8] The Secretary was not personally served in the District of the Canal Zone and could not be served by mail under 28 U.S.C. 1391(e), because that section does not apply to civil actions in the Canal Zone. See *Doyle* v. *Fleming*, 219 F. Supp. 277 (D.C.Z.).

Petitioners are attacking the Secretary's regulations which, by statute and presidential executive order, are binding upon respondent both in his capacity as Governor of the Canal Zone and as President of the Panama Canal Company. 2 C.Z. Code 142; Exec. Ord. No. 11171, 29 Fed. Reg. 11897. Thus, unless the Secretary is compelled to modify his present regulations, respondent is without authority to restore the former differential which the Secretary has cancelled. In order to give effective relief, the Secretary must take action authorizing payment of the former differential; simply enjoining respondent from implementing the new differential standards, as the court below noted, would not achieve petitioners' goal in this suit (see Pet. App. 18a-21a).

4. Finally, insofar as the suit was directed against respondent as Governor of the Canal Zone,[9] the court below properly characterized it as an unconsented action against the United States.[10] It has been settled by this Court that, absent an express waiver of sovereign immunity, a suit nominally against an officer of the United States may not be maintained if in reality it is an action against the government itself.[11] In determining when a suit is actually against the United

[9] The Canal Zone Government, as an independent agency of the United States (2 C.Z. Code 31), enjoys the immunity from suit of the United States. *Chournos* v. *United States*, 335 F. 2d 918 (C.A. 10); *cf. Blackmar* v. *Guerre*, 342 U.S. 512; *United States* v. *Remund*, 330 U.S. 539.

[10] Sovereign immunity would not bar an action against the Canal Company which is a "sue and be sued" corporation. See 2 C.Z. Code 65(a)(2), (3).

[11] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

States, "[t]he general rule is that the relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii* v. *Gordon,* 373 U.S. 57, 58. And a decree operates against the government "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with public administration,' *Land* v. *Dollar,* 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' *Larson* v. *Domestic & Foreign Corp.,* [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank,* 372 U.S. 609, 620. In short, the essential nature and effect of the proceeding, not the form of the action, determines the impact of the suit on the United States. *Mine Safety Co.* v. *Forrestal,* 326 U.S. 371, 374. Here petitioners are seeking recovery of millions of dollars in past and future salary differential payments. Plainly, if the relief prayed for were granted, they would expect the government and not respondent to provide these sums. Thus, as the Court stated in *Mine Safety Co.,* "the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensible party * * *" (326 U.S. at 375).[12]

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[12] That the Canal Zone Government is supported in large measure out of toll revenues from the Canal rather than out of general tax revenues does not change the fact that the relief which petitioners seek is against "money which the government owns." *Mine Safety Co.* v. *Forrestal, supra.* See *American Guaranty Corp.* v. *Burton,* 380 F. 2d 789, 791 (C.A. 1), squarely rejecting a contention identical to that made by petitioners (Pet. 14-16), *viz.,* that consent to sue the United States is unnecessary where recovery is sought out of public funds not raised as part of the general revenue.

Since the United States has not consented to be sued in the District Court for the District of the Canal Zone, the Fifth Circuit was correct in holding that court to have been without jurisdiction to entertain this action against respondent as Governor. *Wells* v. *United States*, 214 F. 2d 380 (C.A. 5), certiorari denied, 348 U.S. 855; cf. *Doyle* v. *Fleming, supra;* 28 U.S.C. 451; 28 U.S.C. 1346(a)(2).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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